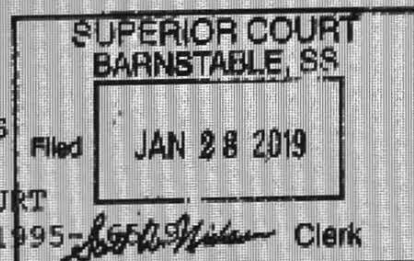


## COMMONWEALTH OF MASSACHUSETTS



BARNSTABLE, ss

SUPERIOR COURT

DOCKET NO. 1995-*1995-1995* Clerk

COMMONWEALTH

v

EMORY SNELL

COMMONWEALTH'S MOTION  
TO CLARIFY

Now comes the Commonwealth, through its District Attorney Michael D. O'Keefe, and respectfully files this motion to clarify the Court's order by Muse, J., on July 10, 2018 for disclosure of the personnel file of Dr. Zane, and submits this memorandum in support. The transcript of the hearing is attached to this memorandum. Further, the Commonwealth requests a hearing on this motion.

**STATEMENT OF PRIOR PROCEEDINGS**

1. The defendant Emory Snell, Jr. was indicted on April 19, 1995 for the first-degree murder of his wife, Elizabeth Lee. A jury trial was held in Barnstable Superior Court from August 21, 1995 - September 1, 1995 (Travers, J.). The defendant was convicted of first-degree murder (by deliberate premeditation) on September 1, 1995.
2. In November, 1996, the defendant's direct appeal was stayed in order for him to pursue a motion for a new trial. The defendant filed his motion in the trial court in October, 1997. In February, 1998, the defendant's motion for a new trial was

denied without a hearing (Travers, J.). A motion to reconsider the denial of the motion for a new trial was also denied without a hearing (Travers, J.). The appeal of the denial of the motion for a new trial was consolidated with the direct appeal.

3. The defendant's conviction was affirmed by the Supreme Judicial Court on February 2, 1999. *Commonwealth v. Snell*, 428 Mass. 766 (1999) (Greaney, J.).

4. On December 20, 1999, the defendant filed a pro se Motion for Release From Unlawful Confinement Rule 30(a) or, Alternatively, New Trial Rule 30(b). This second motion was denied March 16, 2000 (Connon, J.). The defendant filed a Notice of Appeal on March 21, 2000

5. The defendant filed his Motion for Leave to Be Heard on Timely Filed Appeal from Denial of Rule 30(a) & (b) New Trial Motion on October 5, 2001. This appeal of the denial of his motion for a new trial was denied by a Single Justice of the Supreme Judicial Court on July 26, 2002 (Spina, J.)

6. On August 29, 2011, the defendant filed a motion for expert funds to retain an expert pathologist and a meteorologist. The defendant filed a renewed Motion to Permit Funds for Forensic Experts on September 16, 2011. This renewed motion was denied without prejudice, to renew, following expected filing of Rule 30 Motion on February 10, 2012.



7. On September 14, 2012, the defendant filed his Motion for Enlargement of 2005 Discovery Order to Include Personnel File.

8. The Commonwealth filed an opposition to the defendant's motion for discovery.

9. The defendant filed a motion for a new trial in December of 2017, and a motion for post-conviction discovery. The Commonwealth filed an opposition to the defendant's motion.

10. On June 12, 2018, Muse, J., heard the defendant's motion for a new trial for "status."

11. On July 10, 2018, the Court ordered the OCME and Commonwealth to review Dr. Zane's personnel file and disclose relevant documents in the defendant's discovery order by July 18, 2018 at 7 PM.

12. The Commonwealth filed a motion to stay with the Single Justice Session of the Suffolk County Clerk's Office. The stay was allowed by Lowy, J., who allowed the Commonwealth time to file a supplemental memorandum. The defendant filed an opposition on August 3, 2018.

14. A hearing was held in the Single Justice Session before Lowy, J., on November 20, 2018.

15. On December 27, 2018, the Court denied the Commonwealth's G.L. c. 211/3 application. "Memorandum of Decision & Judgment: as on file. Lowy, J. " It is ORDERED that the Commonwealth's petition, pursuant to G.L. c. 211, §3 is denied. The



Commonwealth is granted leave to file a gatekeeper petition, pursuant to G.L. c. 278, §33E. This court's order, dated July 16, 2018, staying the Superior Court's order requiring production of certain records of the Office of the Chief Medical Examiner, shall continue for a period of thirty additional days. During that period, the parties may pursue any further proceedings in the Superior Court or this court, as they deem necessary or appropriate."

#### STATEMENT OF FACTS<sup>1</sup>

The defendant and the victim lived together at their home at 1051 Putnam Avenue Extension, Marstons Mills. In the early evening hours of March 16, 1995, the victim obtained a protective order against the defendant under G. L. c. 209A, and, at the same time, a Barnstable police officer obtained an arrest warrant for him on charges that he threatened to murder the victim and burn down their home. After the G. L. c. 209A order and the arrest warrant were finalized, the police went to the home with the victim and arrested the defendant who, when he was placed under arrest, told the police, "This is fucking bullshit." The defendant also made derogatory remarks about the victim which were false. Later on the night of March 16, the defendant posted bail and checked into a local hotel for a one-

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<sup>1</sup> The facts are copied verbatim from the Supreme Judicial Court opinion of *Commonwealth v. Emory Snell*, 428 Mass. 766 (1999).



night stay. There was no precise record of when the defendant checked out of the hotel.

Early on the morning of March 17, the defendant's truck was seen parked in front of the marital home by a neighbor who was walking his dog. The neighbor then heard the truck start up and saw the defendant driving it. The neighbor had never seen the defendant leave his house so early in the morning, and the neighbor noticed that the defendant drove away on a route which the neighbor had not seen him use before. The neighbor fixed the time of the defendant's departure at slightly before 6:30 A.M.

Around noon on March 17, the defendant spoke with a witness. The defendant seemed very calm. He told the witness that the court system can cause a major problem between husband and wife, that he had put the victim up on a pedestal after marrying her and did not want her working two jobs, that he and the victim were having a conflict which had reached the point that required the defendant to leave their home, and that, after he had left, the victim had called the police. Later on the afternoon of March 17, the defendant went to the clerk's office of the Barnstable District Court seeking to have the G. L. c. 209A order against him removed. The defendant told an assistant clerk that the entry of the order had been a misunderstanding. The defendant's demeanor during the conversation was described as "determined."



The victim's daughter last spoke with her mother on March 15. Between March 16 and March 18, the victim's daughter tried to contact her mother on the telephone several times. The telephone at the victim's home would ring, but the answering machine did not engage. After speaking with family members on March 18, the victim's daughter telephoned the police expressing concerns about her mother's well-being.

The victim's son also had tried to telephone his mother repeatedly and became concerned when she did not answer his calls or telephone him. He took note of her failure to respond to messages, inviting her to his home to celebrate his wife's birthday, and of her failure to call to wish his wife a happy birthday. The victim's son went to his mother's home twice on March 17, and received no response to his attempts to enter. He saw the victim's car in the driveway. On March 18, the victim's son drove past his mother's home and saw her car parked where it had been located the previous day.

As a result of telephone calls by the victim's family, a Barnstable police officer went to the home to check on the well-being and safety of the victim. The officer obtained no response when he knocked, and he saw that all the windows and doors of the house were locked. The officer entered the home by pushing aside a frame covering the entrance to the cellar; he looked for the victim, and shortly after his entry, the officer found her

dead in one of the upstairs bedrooms. During a later search of the perimeter of the home, the officer noticed that the wires in the telephone junction box had been pulled away from their terminals. This condition of the wires would cause persons calling the victim to hear a ringing at their end of the line, but the call would not ring through, and anyone picking up the telephone inside the house would not get a dial tone.

The medical examiner determined that the victim had died as a result of asphyxia due to smothering.<sup>2</sup> The examiner observed seventeen injuries on the victim's body which were inflicted contemporaneously or within minutes of the time of her death. The examiner placed the probable time of death between the hours of 11 P.M. on March 16, and 6:30 A.M. on March 17.

The jury could also have found that a hostile relationship existed between the defendant and the victim. In September,

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<sup>2</sup> Doctor Zane testified that the cause of death was asphyxia due to smothering. Dr. Zane viewed the body at crime scene and conducted the autopsy (Tr. 987). The victim had 17 injuries on her body, inflicted contemporaneously and within minutes of the time of death (Tr. 969, 981-982). The injuries suffered by the victim in and around the time of death were consistent with asphyxia due to smothering (Tr. 1020-1021). Petechial hemorrhages indicative of asphyxia due to smothering were present on the victim's windpipe and on the surface of her right lung (Tr. 988). The doctor testified that inhaler use "absolutely did not" cause the victim's death, and her heart was perfectly normal (Tr. 1019). When her body was turned face up, Zane noted injuries to her face of some significance (Tr. 957). There was 1/16" abrasion on the upper right eyelid, a 1/8" abrasion on the front of the right ear, and a 1/4" abrasion at the angle of the right jaw (Tr. 969-970).



1993, they had argued 'violently' and the victim 'sought' help from a neighbor after the defendant attempted to choke her and smother her. In 1994, the defendant and the victim had argued again. The victim expressed anger toward the defendant, and he told her, "If I can't have you, nobody will."

The defendant maintained that the police had not properly investigated the case and neglected to gather evidence that might have exculpated him. He attacked the credibility of the Commonwealth's witness who placed him at the marital home early on the morning of March 17. He suggested that the victim may have died from natural causes. The defendant also claimed that he did not go near the marital home after he had been arrested, and that his presence elsewhere could be accounted for during all critical times.

#### ARGUMENT

The defendant filed a motion for a new trial and a motion for post-conviction discovery, pursuant to Mass. R. Crim. P. 30(c). The motion requested Dr. Zane's "personnel file and all documents evidencing and reflecting protocols or restrictions of OCME in existence in 1995 for the conduct of suspected homicide autopsies." (Tr.74-75)

The motion judge initiated a multi-step process for the records to be produced. First, the judge requested that the "DA and OCME get together, review the file, and tag things very



"clearly." (Tr.86) Second, the DA and OCME are to "red flag" any irrelevant documents." (Tr.87) Third, the judge was to "conduct an in camera inspection" of the records. (Tr.87) Next, the judge was, after considering all the issues, have counsel inspect the records that the judge deemed relevant. Then, defense counsel was to decide what documents he deems relevant for purposes of his motion. (Tr.88) The Commonwealth then has an opportunity to object when notified of the documents chosen. (Tr.88) The judge then considers the positions of the defendant and the Commonwealth, and determines what documents are to be disclosed.

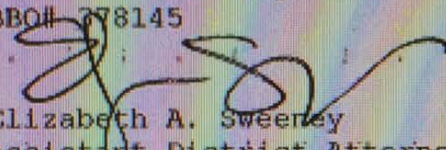
Therefore, the Commonwealth requests that this Court review the defendant's motion for a new trial and discovery motion, and determine what procedure is to be utilized in this case in the defendant's motion for discovery. The Commonwealth and General Counsel for the OCME, in addition to defense counsel, should be present to understand clearly the discovery process in this Mass. R. Crim. P. 30(c) matter.



RELIEF REQUESTED

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court clarify the discovery procedure to be utilized in this Mass. R. Crim. P. 30 motion.

Respectfully submitted,  
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January 25, 2019




**CERTIFICATE OF SERVICE**

I, Elizabeth A. Sweeney, certify that I have on this day delivered via first class mail to Clerk of the Barnstable Superior Court, Criminal Business, a copy of the Commonwealth's Motion to Clarify, and I have transmitted via e-mail and hard copy, per defense counsel's request a copy of same to:

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January 28, 2019



Elizabeth A. Sweeney  
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